Supreme Court, U.S.
FILED
05- 59 JUL 8 - 2005
OFFICE OF THE CLERK

No.

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

JUSTIN WAYNE MATTHEWS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether 18 U.S.C. 2251(a), which prohibits the use of children in the production of child pornography that "was produced using materials that have been mailed, shipped, or transported in interstate or foreign commerce," is unconstitutional, as exceeding Congress's Commerce Clause authority, as applied to respondent's production of child pornography using a camera, videotape, and videotape component parts that had been shipped in interstate commerce.

2. Whether 18 U.S.C. 2252A(a)(5)(B), which prohibits the knowing possession of child pornography "that was produced using materials that have been mailed, or shipped or transported in interstate or foreign commerce," is unconstitutional, as exceeding Congress's Commerce Clause authority, as applied to respondent's intrastate possession of the same pornographic images.

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No.

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JUSTIN WAYNE MATTHEWS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States of America, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-2a) is unreported. The opinion of the district court (App., *infra*, 3a-38a) is reported at 300 F. Supp. 2d 1220.

JURISDICTION

The judgment of the court of appeals was entered on April 11, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Commerce Clause of the United States Constitution, Article I, Section 8, Clause 3, provides: "The Congress shall have Power * * * To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

2. Title 18 of the United States Code, Section 2251(a), provides in pertinent part:

> (a) Any person who employs, uses, persuades, induces, entices, or coerces any minor to engage in * * * any sexually explicit conduct for the purpose of producing any visual depiction of such conduct, shall be punished [by fine and imprisonment], if such person knows or has reason to know that such visual depiction will be transported in interstate or foreign commerce or mailed, if that visual depiction was produced using materials that have been mailed, shipped, or transported in interstate or foreign commerce by any means, including by computer, or if such visual depiction has actually been transported in interstate or foreign commerce or mailed.

18 U.S.C. 2251(a).

3. Title 18 of the United States Code, Section 2252A(a)(5)(B), provides:

> (a) Any person who–
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> * * * * *
>
> (5) * * * * *
>
> (B) knowingly possesses any book, magazine, periodical, film, videotape,

> computer disk, or any other material that contains an image of child pornography that has been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer, or that was produced using materials that have been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer,
>
> * * * * *
>
> shall be punished [by fine and imprisonment].

18 U.S.C. 2252A(a)(5)(B).

STATEMENT

Respondent was indicted in the United States District Court for the Northern District of Alabama on one count of producing child pornography, in violation of 18 U.S.C. 2251(a), and one count of knowingly possessing child pornography, in violation of 18 U.S.C. 2252A(a)(5)(B). App., *infra*, 4a-5a & n.7. The government's theory of prosecution was that the pornographic images in question had been "produced using materials" that had traveled in interstate commerce. *Ibid.* The district court initially denied respondent's motion to dismiss the indictment, and respondent entered a conditional plea of guilty, reserving the right to challenge the adequacy of the interstate commerce nexus in this case. *Id.* at 3a-4a & n.1. The district court granted respondent's motion for reconsideration, however, and subsequently dismissed the indictment. *Id.* at 37a-38a. The court of appeals affirmed, holding that the application of Sections 2251(a) and 2252A(a)(5)(B) to

respondent's conduct exceeds Congress's authority under the Commerce Clause. *Id.* at 1a-2a.

1. In July or August 2002, respondent Justin Wayne Matthews made a videotape of himself as he engaged in consensual sexual activity with a 16-year-old girl. Respondent was 22 years old at that time. The sexual activity depicted on the videotape (but not the taping itself) was lawful under the law of Alabama, where it occurred. The age of consent in Alabama is 16. Alabama does, however, have its own child pornography law, which prohibits the production and possession of visual depictions of persons under the age of 17 engaging in sexual activity. See App., *infra*, 6a-7a & nn.8-9.

Respondent was charged with one count of production of child pornography, in violation of 18 U.S.C. 2251(a), and one count of possession of child pornography, in violation of 18 U.S.C. 2252A(a)(5)(B). App., *infra*, 4a. The government alleged that the federal law was applicable because the camera, the videotape, and the videotape's component parts had traveled in interstate commerce. *Id.* at 5a. Respondent moved to dismiss the indictment, arguing that Sections 2251(a) and 2252A(a)(5)(B) are unconstitutional on their face and as applied to his conduct because they exceed Congress's authority under the Commerce Clause. *Id.* at 4a.

2. The district court initially denied the motion to dismiss. See App., *infra*, 3a n.1. Shortly thereafter, however, the Ninth Circuit held in *United States* v. *McCoy*, 323 F.3d 1114, 1133 (2003), that the federal ban on possession of child pornography is unconstitutional as applied "to the simple intrastate possession of a visual depiction (or depictions) that has not been mailed, shipped, or transported interstate and is not

intended for interstate distribution or for economic or commercial use, including the exchange of the prohibited material for other prohibited material." Relying on *McCoy*, respondent moved for reconsideration of the district court's order denying his motion to dismiss.

The district court granted the motion for reconsideration and dismissed the indictment. App., *infra*, 3a-38a. The court held that application of the federal child pornography laws to respondent's conduct lies outside Congress's authority under the Commerce Clause. The court stated that "[t]he exploitation of a minor in home-produced video recordings of sexual acts is, unquestionably, despicable; but when it is done with no intention to sell, distribute, or exchange the tapes thus produced it is not 'commerce.'" *Id.* at 17a. The court rejected the government's reliance on *Wickard* v. *Filburn*, 317 U.S. 111 (1942), stating that "[u]nlike *Wickard*, there is no evidence in the case before this court suggesting that defendant's home-production and possession of the video recording that is the basis for indictment had any plausible impact on the supply, demand, or price of child pornography in the national 'market' for such perversions." App., *infra*, 21a; see *id.* at 17a-22a. The court further found that the commerce nexus on which the government relied—*i.e.*, that the camera and videotape had moved in interstate commerce—is "for all practical purposes useless" because it does not ensure that the pornographic images themselves substantially affect interstate commerce. *Id.* at 24a. The district court concluded that Sections 2251(a) and 2252A(a)(5)(B) "are unconstitutional *as applied to* simple *intra*-state production and possession of images of child pornography * * * when such images * * * were not mailed, shipped, or transported in interstate or foreign commerce by any means, including by

computer, nor intended for interstate distribution or economic activity of any kind, including exchange of the pornographic recording for other prohibited material." *Id.* at 37a.

3. The court of appeals affirmed. App., *infra*, 1a-2a. During the pendency of the government's appeal, the Eleventh Circuit issued its decisions in *United States* v. *Maxwell*, 386 F.3d 1042 (2004), petition for cert. pending, No. 04-1382 (filed Apr. 14, 2005), and *United States* v. *Smith*, 402 F.3d 1303 (2005), vacated and remanded, No. 04-1390 (June 20, 2005). The court in *Maxwell* held that the ban on possession of child pornography contained in 18 U.S.C. 2252A(a)(5)(B) exceeds Congress's authority under the Commerce Clause in cases where the only link to interstate commerce is that the pornographic images were "produced using materials" that have traveled interstate. See 386 F.3d at 1055-1070. The court in *Smith* extended that holding to the production ban contained in 18 U.S.C. 2251(a). See, *e.g.*, 402 F.3d at 1323 (finding "no constitutionally significant distinctions" between the possession and production offenses with respect to the validity of the "produced using materials" jurisdictional element).

In this case, the court of appeals held that its decision in *Maxwell* compelled dismissal of the possession count of respondent's indictment, and that the decision in *Smith* compelled dismissal of the production count. App., *infra*, 2a. The court of appeals accordingly affirmed the judgment of the district court. *Ibid.*

REASONS FOR GRANTING THE PETITION

The court of appeals held that 18 U.S.C. 2251(a) and 18 U.S.C. 2252A(a)(5)(B), which prohibit production and possession respectively of child pornography "produced using materials" that have traveled in interstate com-

merce, are unconstitutional as applied to respondent's conduct. The court's decision is erroneous, and it seriously undermines Congress's comprehensive scheme to eliminate the interstate market in child pornography.

The Eleventh Circuit's decision also conflicts with decisions of other courts of appeals. Other federal circuits have rejected similar Commerce Clause challenges to 18 U.S.C. 2251(a)'s production ban as applied in similar circumstances. See, *e.g.*, *United States* v. *Mugan*, 394 F.3d 1016, 1021-1024 (8th Cir. 2005); *United States* v. *Morales-De Jesus*, 372 F.3d 6, 10-21 (1st Cir. 2004), cert. denied, No. 04-6974 (June 20, 2005); *United States* v. *Holston*, 343 F.3d 83, 90 (2d Cir. 2003); *United States* v. *Galo*, 239 F.3d 572, 574-576 (3d Cir. 2001). Other courts of appeals have likewise sustained the constitutionality of federal laws banning the possession of child pornography that is "produced using materials" that have traveled in interstate commerce. See, *e.g.*, *United States* v. *Robinson*, 137 F.3d 652, 656 (1st Cir. 1998); *United States* v. *Harris*, 358 F.3d 221, 222-223 (2d Cir. 2004); *United States* v. *Rodia*, 194 F.3d 465, 474-482 (3d Cir. 1999), cert. denied, 529 U.S. 1131 (2000); *United States* v. *Kallestad*, 236 F.3d 225, 228-231 (5th Cir. 2000); *United States* v. *Angle*, 234 F.3d 326, 337-338 (7th Cir. 2000), cert. denied, 533 U.S. 932 (2001).

In affirming the dismissal of respondent's indictment, the court of appeals found this case to be controlled by its recent decisions in *Maxwell*, which held 18 U.S.C. 2252A(a)(5)(B) unconstitutional as applied to the intrastate possession of child pornography "produced using materials" that have traveled in interstate commerce, and *Smith*, which extended that constitutional holding to the production offense defined by 18 U.S.C. 2251(a). The United States previously filed petitions for writs of